Supreme Court, U.S.
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No. 98-1482

In the
Supreme Court of the United States
October Term, 1998

AVR, INC.,
a Minnesota Corporation,
Petitioner,

v.

CITY OF ST. LOUIS PARK,
a Minnesota Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Has a municipality taken property for public use when it requires the owner of valuable residentially-zoned property to terminate the existing non-conforming industrial use by amortization upon recoupment of the owner's investment in that use.

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STATEMENT OF THE CASE

The following facts are intended to correct inaccuracies and omissions in the statement by Petitioner.

Without any citation to the record, Petitioner inaccurately states that the City is "forcing the Petitioner to hold the property without any economically viable use (at least until the property and the surrounding property are ripe for redevelopment)." (Pet. 13-14.) The record in fact shows that the property has a viable economic use for residential development. AVR's own appraiser values the land alone at $260,000.00. (Resp't App. A-17.)[1] AVR's appraiser agrees that the land can be developed as a high density residential use under the current zoning or as a commercial or light industrial use with a zoning change. He states:

> Legally, the site is zoned R-4, multi-family residential district. This zoning represents a change from the sites (sic) prior I-1 zoning as of year end 1992. The new zoning allows for residential development of various dwelling types at densities of up to 30 units per acre. Some uses that would apply include two family dwellings, apartments, condominiums, as well as open space, and community facilities. We find that from a legal standpoint the subject site could be developed within any one of these allowable uses under current zoning. The economic factors that relate to the subject are fair to good. The area is heavily developed to the south with various industrial developments, which

[1] The Market Value Appraisal was submitted to the Minnesota District Court as Exhibit 5 of the stipulated record.

> would tend to discourage residential development so near to such an area. However, there is only a limited availability of vacant land in St. Louis Park which bodes well for the development of available vacant land sites in the area.
>
> Another support to the residential zoning for this site is the somewhat stronger market for residential properties than for either industrial or commercial construction. However, the site could yet be developed as either a commercial or light industrial development of higher quality with a zoning change, due to the significant presence of such developments in the area fronting Louisiana Avenue.
>
> * * *
>
> In conclusion, our analysis indicates that the site as vacant avails itself to almost all logical, physically possible multi-family residential type development in accordance with the sites (sic) current zoning, though the site could yet avail itself to higher quality commercial or light industrial development with a zoning change.

(Resp't App. A-18 to A-19.)[2]

Petitioner states that AVR's 2.6 acre parcel is surrounded by commercial and light industrial uses, citing to App. A-3. (Pet. 3.) There is no support for this general statement at

[2] The April 20, 1995 supplemental letter to the appraisal was submitted to the Minnesota District Court as Exhibit 6 of the stipulated record.

App. A-3 or elsewhere. The City's unchallenged Findings of Fact relating to the surrounding neighborhood state:

> **Factor (4): Description of the character of and uses in the surrounding neighborhood.**
>
> 15. AVR is surrounded by a stable single-family residential neighborhood to the east, three businesses of primarily office or quasi-industrial character to the north, none of which apparently involve industrial activity similar to AVR's use and in any event do not involve outdoor processing activities; a vacant building that formerly was used by a security company, immediately to the south; a multiple-family residential neighborhood to the west across Louisiana Avenue; and, to the southwest a restaurant that serves both the single-family residential neighborhood to the east of AVR as well as the multiple-family residential neighborhood to the west.
>
> 16. Other existing, small commercial uses in the vicinity do not present the intense conflicts with the neighborhood and surrounding residential development and redevelopment that the AVR ready-mix facility does.

(App. A-15.)

Petitioner also states that "[t]he City confirmed that there was no redevelopment plan for the property or the surrounding area," citing to App. A-27 to A-28. (Pet. 6.) There is no support for this statement. The City's Findings of Fact relating to this topic state:

13. At present, the area that includes AVR is in the process of redeveloping, and the ready-mix facility is now surrounded by Residential and Commercial Use Districts that contain the Park Tavern Restaurant, the "3300 on the Park" condominium complex, the Oak Park Village townhomes, and a single-family neighborhood that includes a small City park and a public library. In addition, redevelopment plans for the area immediately surrounding AVR emphasize construction of additional multiple-family residential housing.

14. The ready-mix use is fundamentally incompatible with existing and planned uses and with the City's zoning and Oak Hill Neighborhood Comprehensive Plan.

(App. A-14 to A-15.)

ARGUMENT

I.

THE FEDERAL QUESTION SOUGHT TO BE RAISED WAS CONCEDED BY PETITIONER AND NEVER ARGUED IN STATE COURT

Petitioner asks this Court to determine whether a "lawful non-conforming use *** can be terminated through amortization." (Pet. i.) In its reply brief to the Minnesota Court of Appeals, Petitioner stated:

> There is no dispute that, as a non-conforming use, AVR may someday be amortized out of existence.

(Resp't App. A-6.)

In state court Petitioner challenged the reasonableness of the amortization period. Petitioner now steps back, changes its legal theory and asks this Court to determine whether a non-conforming use can be terminated by amortization, the exact point Petitioner expressly conceded in state court.

II.

REQUIRING THE OWNER OF VALUABLE RESIDENTIALLY-ZONED PROPERTY TO TERMINATE THE EXISTING NON-CONFORMING INDUSTRIAL USE BY AMORTIZATION IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY FOR PUBLIC USE

Amortization is a well-recognized regulatory tool which requires a property owner to terminate a non-conforming use at a future date. As in this case, the reasonableness of the

amortization period generally considers the owner's recoupment of investment, together with a general balancing of the public benefit versus the private loss. Every federal circuit that has addressed amortization has found such provisions to be facially valid. *See Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th Cir. 1996); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985); *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

The Supreme Court has long recognized a municipality's right under its police power to terminate the existing use of property so long as the owner is not denied all economically beneficial use of the land. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the town adopted an ordinance prohibiting any excavation below the water table. The effect of this safety ordinance was to completely prohibit the mining of sand and gravel on appellant's property, a use to which the property had been put continuously since 1927. This Court upheld the regulation:

> If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.

Id. at 592. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 133-34 (1978) (confirming that use need not be common law nuisance to be prohibited); *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding destruction of diseased cedar trees to prevent damage to apple orchards); *Hadacheck v.*

Sebastian, 239 U.S. 394 (1915) (upholding ordinance which terminated an otherwise lawful brickyard; city council had reasonably concluded that the brickyard was inconsistent with neighboring uses). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023-24 (1992) (*Hadacheck*, *Miller*, and *Goldblatt* were progenitors of this Court's more contemporary statement that no taking occurs if the regulation substantially advances a legitimate state interest).

Petitioner's reliance on *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Lucas* is entirely misplaced. *Nollan* and *Dolan* involved exactions. The property owners were required to convey a property interest to the public as a condition of approval. *Lucas* involves a regulation depriving land of all economically beneficial use, with the Court upholding such a complete prohibition only if the proscribed uses were never part of the owner's "bundle of rights" based upon restrictions that background principles of the state's law of property and nuisance place upon land ownership. Here, it is undisputed that the property has a wide array of economically beneficial uses.

CONCLUSION

Petitioner did not raise the question in state court that it now seeks to have this Court decide. Petitioner conceded that amortization is constitutional, choosing to challenge the reasonableness of its application in this situation.

This Court has consistently upheld the right of a municipality in the exercise of its police power to require the termination of the current use of property so long as the land has a beneficial economic use. Every federal circuit court addressing amortization has found the regulation to be facially valid.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF MINNESOTA
IN COURT OF APPEALS
CASE NO. C7-98-516

AVR, Inc.,
a Minnesota corporation,

Appellant,

v.

City of St. Louis Park,

Respondent.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

The City makes essentially four points in its Brief, two of which AVR agrees with and two of which it does not. Those four points are:

1. The amortization of non-conforming uses is an appropriate and recognized municipal planning tool. Resp. Brief pp. 15-18.

2. Tax depreciation and recoupment of investment are factors considered by some courts in determining the length of the amortization period. Resp. Brief pp. 19-25.

3. As a non-conforming use, AVR enjoyed a monopolistic position which justifies a shorter amortization period. Resp. Brief pp. 20, 25-26.

4. The City established that AVR generates unacceptable levels of dust, noise and traffic. Resp. Brief pp. 26-31.

With respect to the first two points, AVR was quite candid and included a lengthy section in its Brief, about the availability of amortization as a planning tool and the emphasis placed by some courts on tax depreciation and recoupment of investment. In particular, the Texas courts have given preeminent importance to tax depreciation and recoupment of investment and, if this Court is similarly inclined, then there is nothing further to discuss.

However, AVR reiterates that for the analysis to rest solely upon tax depreciation and recoupment of investment

ignores the overarching consideration cited in all treatises and articles, and the vast majority of jurisdictions, addressing amortization: the public benefit versus the private loss. This overarching consideration militates against a simplistic approach and rather mandates the application of many factors on a case by case basis. Such an analysis in this case establishes that AVR's St. Louis Park facility is situated in an area that is still primarily commercial/industrial in nature and that the City's ultimate plan to transform the area to predominantly residential is many years away.

With respect to the City's third and fourth points, the record does not support a finding either that AVR enjoys a monopoly status as a non-conforming use or that AVR is a nuisance. The City's own evidence establishes that AVR faces stiff competition in the market serviced by the St. Louis Park facility. With respect to the numerous City findings about noise, dust and traffic generated by AVR, the City, as did the district court, entirely ignores the evidentiary record. The plant is admittedly no architectural wonder, but it does have a permit from the Minnesota Pollution Control Agency which regulates plant emissions and it does meet statutory noise standards. The City's nuisance allegations really amount to a purely aesthetic complaint which, while having some legitimacy, could easily be ameliorated by less severe means than amortization such as berms, blacktopping, landscaping and the like. To entirely eliminate an established business because of the subjective complaints of a handful of residents completely ignores the requirement that, first and foremost, amortization take into consideration the public benefit versus the private loss.

II. AMORTIZATION AS A PLANNING TOOL

There is no dispute that, as a non-conforming use, AVR may someday be amortized out of existence. What is critical is the framework that will be established by this Court, now 30 years after Naegele, for determining the length of the amortization period. AVR repeats the basic test:

> The basic test involves balancing the public gain against the private loss. Indeed, some commentators describe the courts as willing to consider "any circumstances bearing upon a balance of the public gain against the private loss." Generally, the relevant considerations include the nature of the present use, the length of the amortization period, and the present characteristics of, and foreseeable prospects for, development of the area. Courts consider all of these factors only in determining the "true issue" of whether beneficial effects on the community resulting from discontinuance of the use will outweigh the losses to the individual land owner.

"Amortization Periods For Non-Conforming Uses," Journal of Urban and Contemporary Law, Volume 34: 99, p. 116 (1988).

Although cosmetically the City did adopt a nine factor test and did generate a lengthy record, as discussed below its basis for a two year amortization period does not weigh the public gain against the private loss.

III. TAX DEPRECIATION/RECOUPMENT OF INVESTMENT

Aside from the fact that tax depreciation and recoupment of investment are not even among the nine factors in the City's

Amortization Ordinance (A1629), this factor depends primarily on what even the Internal Revenue Services recognizes is a tax fiction:

> The concept of useful life is de-emphasized where depreciation is computed under depreciation systems (such as ADR, ACRS, and MACRS) because specific recovery periods are provided by statute that may be unrelated to, or shorter than, the estimated useful life of property.

1998 CCH Standard Federal Tax Reporter, Vol. 3, ¶ 11,005. Thus, for example, if nonresidential real property were placed in service on May 12, 1993, the recovery period for the cost of such property under the straight-line method would be 31.5 years whereas, if the same property were purchased a day later on May 13, 1993, the recovery period would be 39 years. CCH Standard Federal Tax Reporter, 1997 Depreciation Guide. Those jurisdictions relying heavily upon tax depreciation and recoupment of investment to the exclusion of other factors have rejected the more thoughtful and reasoned public gain versus private loss analysis which is aimed at reflecting the practical realities of amortizing a business out of existence. AVR urges this Court to reject a simplistic approach utilizing only one or two factors. Rejecting this approach is particularly appropriate in this case where tax depreciation and recoupment of investment were not even among the nine factors set forth in the City's amortization ordinance, but were obviously afterthoughts.

IV. AVR DOES NOT HAVE A MONOPOLY POSITION IN THE MARKET

The City adopted a two year amortization period for AVR's St. Louis Park facility pursuant to Ordinance No. 2039-95 which amends § 14:7-4 of the St. Louis Park Zoning Ordinance. (A2549). Findings 25-28 (A2556) in support of the two year period assert that AVR has enjoyed a "monopolistic market position," the benefit of which significantly mitigates the private loss it will incur as a result of losing the facility.

However, the unrebutted testimony submitted by AVR was that, if its St. Louis Park facility is lost, it cannot compete with Cemstone's concrete plant in western Minneapolis and Model Stone's concrete plant at Lyndale and Crosstown. (A1787). Thus, although caselaw *suggests* that a non-conforming use may enjoy monopoly status, AVR's unrebutted evidence to the contrary overrides such caselaw.

The City's Findings 26 and 27 imply that AVR will either be able to service the market area serviced by the St. Louis Park plant through its other facilities[1] or that AVR did not undertake satisfactory efforts to relocate to another location within the market area. Again, AVR submitted lengthy testimony and documentary evidence from its experts that market area is limited by the delivery time of concrete (which is perishable) and that no other sites were available for relocation. See, Study of AVR St. Louis Park Relocation, A0347-A0356, prepared by John Voss who has 32 years of municipal planning experience. Mr. Voss and another AVR expert, Dale Runkel, testified that they called and personally

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[1] The City's Brief at p. 24 cites to A1777 in support of its assertion that "AVR has a network of ready-mix plants in the western half of the metropolitan area...." The cite does not contain anything on that subject.

met with appropriate officials of municipalities located within the market area served by AVR's St. Louis Park facility and determined that there were no relocation sites available. (A0352, A1786, A0643, A1788, A1836). Mr. Runkel spent 45-50 hours meeting and talking to city staff members and viewing properties. (A1836). AVR cannot relocate and cannot service the market area from its other plants. (A1885-A1897).

There is no basis for any conclusion other than that, far from having a monopoly position, AVR will lose the market area serviced by the St. Louis Park facility.

V. AVR IS NOT A NUISANCE

City Findings 8, 9, 10, 19, 20, 22 and 23 all relate to the reduced noise, dust and traffic that will supposedly be occasioned by the elimination of AVR's St. Louis Park facility. The only evidence cited by the City in support of these Findings is complaints from a condominium complex to the west of the plant called 3300 On the Park.

The City fails to point out that homeowners to the east of the plant, who are as close in proximity as the residents in 3300 On the Park, signed a petition which states:

> We the undersigned have experienced no problems with AVR under normal working conditions. We are offended the City is trying to remove a viable business.

A2528. To the extent that any weight could be given to the subjective complaints of residents, the weight of such evidence is offset by other residents who clearly appreciate AVR's presence in the community.

AVR submitted to the City its emission permit from the MPCA. (A1877). Further, noise levels are controlled by statute. Minn. Rules § 7030.1040, promulgated by authority of Minn. Stat. § 116.07, Subd. 4.

AVR's aggregates are washed prior to delivery to the St. Louis Park plant and the concrete is premixed at the plant before it is loaded in the truck so there is nothing in the concrete mixing and loading process that would generate dust. (A1887-A1888). Any dust generated by trucks entering and leaving the plant could be eliminated by blacktopping the yard, AVR pointed out during the hearings that there are other industrial uses in the immediate area which create dust but that no effort was undertaken by the City to determine the source. (A1882). In fact, the City conducted no traffic count, no dust and/or air pollution counts and no noise testing. (A1776).

Finally, the intersection of Highway 7 and Louisiana Boulevard is a heavily trafficked area. Mr. Voss testified that Louisiana Boulevard generates 10,000 trips a day, of which AVR generates only 75 round trips a day. (A1882). A 79 unit apartment complex, which the City maintains would be appropriate for the site, would generate 500 trips a day. (A1784).

Empirical data could have been collected by the City but it failed to do so. Neighborhood complaints cannot support the City's Findings in the face of the weight of AVR's evidence.

VI. AVR'S LOSS IS SUBSTANTIALLY GREATER THAN ANY BENEFIT TO THE PUBLIC FROM ELIMINATION OF AVR`S PLANT AT THIS TIME

The City's Findings 19 through 23 purport to set forth the benefit to the public from termination of AVR's non-conforming use. Aside from those Findings essentially stating that a nuisance will be removed, Finding 21 states:

> 21. Redevelopment activities may accelerate after the termination of AVR's non-conforming use, and may make the property available for different uses consistent with the City's Comprehensive Plan and the zoning ordinance.

(A2555).

The City asserts throughout its Brief that removal of AVR's plant is needed before redevelopment of the area as high density residential can continue. This simply is not an accurate description of what must occur before residential development continues. There cannot be any dispute that AVR's St, Louis Park facility is located in a predominantly industrial/commercial area. Appellant's Brief at pp. 35-36 describes the industrial/commercial uses in the area. See also, Shenehon Appraisal at A0261 and the list of 34 businesses surrounding AVR at A0704.[2] AVR's 2.5 acre parcel is sandwiched between other industrial or commercial uses which will also have to be eliminated before redevelopment can begin. Mr. Voss went door-to-door and spoke with many of the owners of the industrial/commercial uses in the area who have not been advised they will have to leave and who do not intend to terminate their businesses for a long time. (A1840-A1841). Mr. Voss testified that the City cannot stick an apartment complex in the midst of these other uses. (A1840-A1841).

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[2] AVR miscited this list in its initial Brief at p. 36.

Consider the following colloquy that occurred at the August 2, 1995 Planning Commission meeting:

> Commissioner Morris: Okay. Madam Chair, I then have another question regarding the two year amortization time is: assuming that the ordinance passes and we're two years in the future with a closed plant, as I think it was Mr. Voss pointed out, the entire area appears to be of a commercial nature. And I guess I question the expectation of a -- of a developer coming in and developing the AVR site into a residential use, sandwiched, as it would be, between a bowling alley, nightclub, and other commercial uses.
>
> And I guess I am wondering what -- what the plan is, other than what the comprehensive plan states for development of this area. Is there an active plan to go in and acquire other lands to create a development park or residential park of some nature or are we going to be, in two years, just looking at a vacant piece of land that is trying to be marketed?
>
> Mr. Harmening: Madam Chair, Commissioner, the property is -- or property in and around Apple Valley Red-E-Mix is currently zoned residential and was guided and zoned as such several years ago as a part of our comp plan update as well as our zoning ordinance update. And that amendment, if you will, or changes was done as part of a planning process which concluded that multi-family residential was the appropriate use for the properties in question.

> At this point in time, we do not have an active plan, if you will, or a development agreement with a developer for the redevelopment of those parcels. But it's our expectation that those types of efforts would be taken in the future. What the timeline is of that I can't speak to right now.

(A1851).

Commissioner Morris' question encapsulates the defect in the City's argument about redevelopment and Mr. Harmening's (the City planner) answer exposes the fallacy of the City's claimed need to terminate AVR's non-conforming use immediately. This is not a case, like Naegele was, where a city needs to eliminate the last or one of the last industrial/commercial uses in what is an otherwise exclusively residential area. The reality is that elimination of AVR's plant would leave vacant land, producing neither income for the landowner or tax revenue for the City, which would remain vacant for years.

Thus, the *only* ostensible benefit to the public deriving from the elimination of AVR's plant would be to calm the aesthetic sensitivities of a very small minority of people relative to the overall uses in the area. Certainly, the industrial/commercial users have no objection to AVR's continued presence and the handful of resident objections are countered by at least as many residents who are "offended" by the City's elimination of AVR's plant. This supposed benefit is weighed against AVR's loss of a revenue generating plant which services a market segment that cannot be reached by AVR's other facilities and which cannot be relocated.[3] Again, the aesthetic complaints could be ameliorated through

[3] Even if relocation were possible it would cost AVR $1.5 million to $1.8 million. (A0478).

screens or berms, blacktopping, further limiting hours of operation, landscaping, limiting the number of trucks parked in the yard and other similar means. There is no support or justification for a two year amortization period utilizing the public benefit versus private loss analysis.

Someday, elimination of AVR's plant will be appropriate. Now is not that time. If the Court cannot determine from the record what a reasonable length of amortization should be, AVR submits that a remand of this matter back to the City for submission of evidence on the timing of redevelopment of the area would be appropriate.

VII. CONCLUSION

> The City's opening quote in the Argument section of its Brief is taken from Naegele:
>
> The continued presence of preexisting non-conforming commercial uses within these residential districts may reasonably be found to vitiate the effectiveness of the entire comprehensive municipal plan.

162 N.W.2d at 215. No such danger is posed in this case by the continued presence of AVR's St. Louis Park facility. The effectiveness of the City's comprehensive municipal plan, at least as it relates to the area surrounding AVR's plant, depends entirely upon the unplanned and unspecified timing of the area's transformation from what are now predominantly industrial/commercial uses to residential uses. When that timing is set in concrete, the elimination of AVR's plant will be a true benefit to the City.

A court will often find the development of the area has not yet reached the point where termination of the non-conforming use is reasonably necessary to serve the public welfare.

"Amortization Periods for Non-Conforming Uses," Journal of Urban and Contemporary Law, Volume 34:99, p. 113 (1988). The commentary to the American Land Institute Model Land Development Code, Article IV suggests that a city should order the discontinuance of an existing use only where a definite plan has been established for the future development of the area. ALI, A Model Land Development Code, pp. 150-58 (1976). AVR submits that this Court should establish such a rule in this case.

Dated: June 5, 1998.

SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER, P.A.

By: /s/

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MARKET VALUE APPRAISAL

Apple Valley Red-E-Mix

St. Louis Park, Minnesota

December 15, 1993

93238

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Exhibit D

SUMMARY OF SALIENT DATA - Continued

Value Estimated By:	
Cost Approach:	$845,000
Sales Comparison Approach:	$1,100,000
Income Capitalization Approach:	$790,000
Final Value Estimate Composed of:	
Land Value:	$260,000
Equipment Value:	$437,000
Building Value:	$203,000
Total Value:	$900,000

SHENEHON
COMPANY
Real Estate & Business Valuations

April 20, 1995

Mr. Anthony J. Gleekel
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RE: SUPPLEMENTAL LETTER TO OUR APPRAISAL OF THE APPLE VALLEY RED-E-MIX PROPERTY DATED DECEMBER 15, 1993

Dear Mr. Gleekel:

As counsel for the Red-e-Mix property in St. Louis Park, you recently informed us of a delay in the application related to the subjects amortization of non-conforming uses with the City. It was further our understanding that the appraisal we have conducted was related to this application. Pursuant to your request and in light of the application delay, the purpose of this letter is to address and clarify a few matters within our appraisal report.

First, the zoning for the subject site had been changed since the year end 1992 to R-4, multi-family residential. We had reported the zoning according to its prior zoning as I-1, light industrial district. Because of this correction the paragraphs on page 43 should read as follows:

"Legally, the site is zoned R-4, multi-family residential district. This zoning represents a change from the sites prior

I-1 zoning as of year end 1992. The new zoning allows for residential development of various dwelling types at densities of up to 30 units per acre. Some uses that would apply include two family dwellings, apartments, condominiums, as well as open space, and community facilities. We find that from a legal standpoint the subject site could be developed within any one of these allowable uses under current zoning. The economic factors that relate to the subject are fair to good. The area is heavily developed to the south with various industrial developments, which would tend to discourage residential development so near to such an area. However, there is only a limited availability of vacant land in St. Louis Park which bodes well for the development of available vacant land sites in the area."

"Another support to the residential zoning for this site is the somewhat stronger market for residential properties than for either industrial or commercial construction. However, the site could yet be developed as either a commercial or light industrial development of higher quality with a zoning change, due to the significant presence of such developments in the area fronting Louisiana Avenue. Because of the concentration of industrial properties already in the area, land values for the subject site would tend not to be any greater for residential development than for industrial, and so from an economical viewpoint of the underlying vacant land industrial development may yet provide the greatest value to the site.

In conclusion, our analysis indicates that the site as vacant avails itself to almost all logical, physically possible multi-family residential type development in accordance with the sites current zoning, though the site could yet avail itself to higher quality commercial or light industrial development with a zoning change."

The new R-4 zoning additionally affects our discussion of zoning on page 30 of the report.

With regard to the highest and best use as improved, we are additionally of the opinion that the subject site currently developed as a cement production facility currently provides the greatest contribution of value to the subject land site. The scarcity of concrete production facilities within the metropolitan area creates a significant level of demand for land sites where such developments can occur, contributing a significant premium to the underlying land value. Therefore from the standpoint of physical and economic characteristics, the highest and best use for the subject land site as improved would be for its continued use as a cement production facility.

Second, our reference to the subject property as a hotel on page 63 was a typo and should refer to the existing property as an industrial property, or concrete production facility. Third, the Cost Approach to Value in the Final Analysis and Reconciliation Section on page 69 should total $845,000 rather than $810,000. All other final values reported are correct.

None of the changes we have identified in this supplemental letter impact on our conclusions of market value for the subject property. If you have any additional questions please contact us.

Thank You,

SHENEHON COMPANY

/s/
William C. Herber
Vice President

cc: Mr. Robert Strachota